

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATTHEW J. KOWALEWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Warrendale, Pa.

*Docket No. 97-405; Submitted on the Record;
Issued October 20, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits.

On June 9, 1987 appellant, a mail handler, sustained an injury in the performance of duty when a sack of mail fell onto the back of his head and neck. The Office accepted his claim for the conditions of contusion to the back of the head and acute cervical strain and sprain. Appellant sustained a recurrence of disability on January 21, 1988. The Office paid medical benefits and monetary compensation for periods of disability. Appellant eventually returned to limited duty with no loss of wages but continued to receive medical treatment.

On March 18, 1991 Dr. Diane Dill, appellant's attending family physician, reported that he suffered from chronic post-traumatic fibromyositis.¹ She stated that his long-term prognosis was fair "in that he will have chronic neck and upper shoulder and back discomfort which will be subject to exacerbations and remissions throughout the rest of his life." She felt that appellant was able to work but was unable to do recurrent repetitive sitting, walking, bending or lifting anything over 20 pounds in a repetitive motion. Dr. Dill reported that she felt that this condition was permanent and that there was no chance for improvement "at this time."

The Office referred appellant, together with a statement of facts and copies of medical records, to Dr. Richard Hershey, a Board-certified neurological surgeon, for a second opinion. On July 16, 1991 Dr. Hershey related appellant's history and his findings on physical examination. He reported that appellant's complaints seemed far out of proportion due to the lack of any abnormal findings present on examination. He stated that appellant's examination was entirely within normal limits, with no evidence of induration, muscle spasm or limited range of motion to support a diagnosis of fibromyositis. "On the basis of this examination," Dr. Hershey stated, "I see no reason for continued disability in this individual, nor do I see any reason for any active therapy at this time."

¹ As the Office has not accepted the condition of fibromyositis as employment related, it remains appellant's burden of proof to establish causal relation.

On August 18, 1991 Dr. Dill reported minimal decrease range of motion of the cervical spine with trigger points at the right supraspinatous trapezius. She diagnosed post-traumatic fibromyositis and released appellant to restricted duty with no heavy lifting over 20 pounds and no repetitive movement.

Appellant continued to receive medical attention. When Dr. Dill relocated to another area of the country in 1992, appellant came under the care of Dr. Dill's associate, Dr. Helen R. Thornton.

In 1994 the Office referred appellant, together with a statement of accepted facts and copies of medical records, to Dr. Robert M. Yanchus, a Board-certified orthopedic surgeon, for a second opinion. On July 13, 1994 Dr. Yanchus related appellant's history, treatment and complaints. Findings on physical examination included the following:

"Examination [of the] cervical spine revealed flexion 27 degree[s] with pain, extension 55 degrees, lateral bending to right 30 degrees with pain, left 40 degrees. Rotation right 75 degrees, left 65 degrees. There is diffuse tenderness over the cervical spine extending to the left with no muscle spasm."

Addressing question posed by the Office, Dr. Yanchus stated:

"Diagnosis: In my opinion, the claimant sustained as a result of a work injury [June 9, 1987] a contusion of the cervical spine. This is a soft tissue injury amenable to recovery in a matter of a few weeks at the very most. The most important diagnosis at the present time is morbid obesity.

"Whether current conditions and complaints can be attributed to the work injury - the answer is no.

"The effects of the work injury have long since resolved. As mentioned this injury is better in a matter of a few weeks at the very most."

Dr. Yanchus reported that appellant had no restrictions. Noting that appellant was 120 pounds overweight and that frequent lifting of more than 100 pounds was considered very heavy work according to the Department of Labor, *Dictionary of Occupational Titles*, Dr. Yanchus concluded that appellant was capable of heavy work because he had demonstrated that he was able to carry such a load around daily.

In a decision dated July 18, 1995, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence, as represented by the opinions of Dr. Hershey and Dr. Yanchus, established that appellant's disability resulting from the injury of June 9, 1987 ceased by no later than July 18, 1995, the date of the decision.

Appellant requested a hearing, which was held on May 1, 1996. She submitted an October 23, 1995 report from Dr. Thornton, who related a history of appellant's injury and medical treatment. Dr. Thornton stated:

"In summary, I feel that [appellant] suffers from post-traumatic fibromyositis. [Appellant's] symptoms are certainly related in their timing from his work injury

in June of 1987. He functions fairly well within the limitations described above. He should continue his medications. Other modalities, including weight loss and possibly more aggressive treatment for reactive depression, might very well be helpful. It is my opinion that his current problems, within a reasonable degree of medical certainty, result from his work injury.”

In a decision dated July 31, 1996, the Office affirmed its July 18, 1995 decision to terminate compensation benefits. The Office again found that the weight of the medical evidence rested with Drs. Hershey and Yanchus, who noted, according to the hearing representative, that there were no objective findings to support that a relatively minor injury was continuing to produce symptomatology seven years later.

The Board finds that the Office has not met its burden of proof to justify terminating appellant’s compensation benefits.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ The Office’s procedure manual provides that, having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration, by the weight of evidence, that entitlement to benefits has ceased.⁴ The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination, and benefits should not be suspended for that reason.⁵

The Office terminated appellant’s compensation benefits based on reports submitted by Drs. Hershey and Yanchus. Dr. Hershey, a Board-certified neurological surgeon and a second-opinion physician, reported that his examination of appellant on July 16, 1991 was entirely within normal limits. He reported that appellant’s complaints seemed far out of proportion to the lack of any abnormal findings. Dr. Hershey specifically found no evidence of fibromyositis, and he saw no reason for continued disability or active therapy. Subsequently, Dr. Yanchus found that appellant’s employment-related conditions had resolved.

Contemporaneous medical opinion evidence, however, both before and after Dr. Hershey’s July 16, 1991 report, supports continuing employment-related disability. On March 18, 1991 Dr. Dill, appellant’s attending family physician, reported that appellant suffered from chronic post-traumatic fibromyositis, that appellant could work within certain physical restrictions, and that appellant’s condition was permanent with no chance for improvement. On August 18, 1991 Dr. Dill found that appellant had a minimal decrease range of motion of the cervical spine with trigger points at the right supraspinatous trapezius. She again diagnosed

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

⁵ *Id.*, Chapter 2.812.7(c)(1).

post-traumatic fibromyositis and released appellant to restricted duty. Dr. Thornton, who took over appellant's care from Dr. Dill, reported as late as October 1995 that appellant continued to suffer post-traumatic fibromyositis, which to a reasonable degree of medical certainty was a result of his accepted employment injury.

The Board finds that Dr. Hershey's July 16, 1991 report and Dr. Yanchus' July 13, 1994 report create a conflict in medical opinion with Drs. Dill and Thornton on the issues of employment-related residuals and disability. Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁶ As there exists a conflict in medical opinion, the Board finds that Dr. Hershey's opinion does not represent the weight of the medical evidence.

The July 31, 1996 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
October 20, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁶ 5 U.S.C. § 8123(a).